

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 22418

NORTHWEST VIDEO, INC.
FLATHEAD LAKE CABLE TV, INC.,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION
and
UNITED STATES OF AMERICA,

Respondents,

KMOS-TV, INC.,

Intervenor.

3179
v. 3479
FILED

MAY 20 1968

WM. B. LUCK, CLERK

On Petition for Review of Orders of the
Federal Communications Commission

REPLY BRIEF FOR PETITIONERS

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Date: May 17, 1968

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REPLY BRIEF FOR PETITIONERS

I. INTRODUCTION

H & B Communications Corporation (hereinafter referred to as "H & B"), the successor in interest to the original Petitioners in this proceeding, ^{1/}believes that for the most part the issues have been fully

^{1/} Simultaneously with the filing of this Reply Brief, H & B Communications Corporation is filing a Motion for Substitution as a Party for the original Petitioners. Since the Court has not had an opportunity to act on that Motion, the caption setting forth the original Petitioners has been retained on this Reply Brief.

joined in the Briefs thus far filed and that no further argument is necessary in support of the points raised by the original Petitioners in their Brief. However, two additional matters raised by the Respondents require brief comment. First, the Respondents, at pp. 11 and 12 of their Brief, have argued that the original Petitioners were precluded, because they did not raise the issues below, from arguing that the Federal Communications Commission (hereinafter referred to as "the Commission") lacks jurisdiction over CATV, that the non-duplication rule restrains free speech, and that the non-duplication rule is a restraint of trade. Second, at page 12 of their Brief, Respondents argue that because the papers filed by the original Petitioners before the Commission make no reference to the need for a hearing, either as a matter of law or because of the particular facts of these cases, the issue of whether a hearing was required is not properly before this Court and may not be considered. Each of these arguments will be discussed in turn.

II ARGUMENT

A. The Petitioners Are Not Precluded From Challenging The Commission's Statutory and Constitutional Authority.

Respondents rely primarily on Section 405 of the Communications Act of 1934, as amended, 47 U.S.C. §405 for their argument that Petitioners are precluded from arguing that the Commission lacks jurisdiction over CATV that the non-duplication rule restrains free speech and that the non-duplication rule is a restraint of trade. In relevant part, Section 405 provides as follow

"The filing of a petition for rehearing shall not be a condition precedent to judicial review. . . except where the party seeking such review. . . relies on questions of fact or law upon which the Commission, or designated authority within the Commission, has been afforded no opportunity to pass."

The fact of the matter is that the Commission has had ample opportunity and has in fact passed on the questions raised by the original Petitioners numerous times. Long before Petitioners sought waiver of the non-duplication rule, the Commission asserted the authority to regulate CATV systems receiving service by microwave. See, e.g. Carter Mountain Transmission Corporation, 32 FCC 459 (1962); First Report and Order in Docket Nos. 14895 and 15233, 38 FCC 683 (1965). A Petition for Review of this proceeding was filed in the United States Court of Appeals for the Eighth Circuit, Black Hills Video Corporation et al. v. United States et al., Case No. 18052 (8th Cir.). Subsequently, and still prior to the time Petitioners first sought waiver of the non-duplication rule, the Commission asserted jurisdiction over all CATV, whether served by microwave or not. Second Report and Order in Docket Nos. 14895, 15233 and 15971, 2 FCC 2d 725 (1966). Attached to the Second Report and Order as Appendix C was the Commission's Memorandum on Its Jurisdiction and Authority. Within 30 days from the release of the full text of the Second Report and Order numerous CATV operators sought reconsideration from the Commission and specifically challenged the Commission's authority to regulate CATV on statutory and constitutional grounds. By Memorandum Opinion and Order

reconsideration, specifically affirmed its interpretation of its statutory authority, and rejected constitutional arguments. Thereafter, Petitions for Review of the Commission Orders asserting jurisdiction over CATV were filed in four different circuits of the United States Court of Appeals, including this Court. Midwest Video Corporation et al. v. United States, et al., Case No. 18348 (8th Cir.); Alice Cable Television Corporation v. Federal Communications Commission et al., Case No. 24434 (5th Cir.); Buckeye Cablevision, Inc. v. Federal Communications Commission et al., Case No. 17766 (6th Cir.); Mission Cable TV, Inc. et al. v. Federal Communications Commission et al., Case No. 21661 (9th Cir.). The cases from the Fifth, Sixth and Ninth Circuits were transferred to the Eighth Circuit, assigned new case numbers and consolidated with both Black Hills Video Corporation et al. v. United States et al., supra. and Midwest Video Corporation et al. v. United States et al., supra., then pending in the Eighth Circuit. Briefs were filed and oral argument held in the consolidated proceeding. In those proceedings the Commission defended its statutory and constitutional authority to regulate CATV on essentially the same grounds set forth in Appendix C to the Second Report and Order and the opinion denying reconsideration of the Second Report and Order. Moreover, during the pendency of the appeals in the Eighth Circuit, this Court decided Southwestern Cable Co. et al. v. United States et al. 378 F 2d 118 (9th Cir. 1967). cert. granted 389 U.S. 911 (1967). The Commission petitioned the Supreme Court for certiorari in the Southwestern Cable Co. case and

certiorari was granted on October 23, 1967, 389 U.S. 911 (1967). Since that time, briefs on the merits have been filed and oral argument held in the Supreme Court, and again the Commission defended its constitutional and statutory authority to regulate CATV on essentially the same grounds set forth in Appendix C to the Second Report and Order and its opinion denying reconsideration of the Second Report and Order. In the meantime, in all instances before the Commission where issues relating to the Commission's statutory or constitutional authority over CATV are raised, the Commission dismisses these issues, usually in less than one sentence, by referring to the Second Report and Order. See e.g., Minnesota CATV, Inc., 7 FCC 2d 943 (1967); Texas Community Antennas, Inc., 10 FCC 2d 203 (1967).

The Commission has therefore passed on the questions of law raised by the Petitioners and demonstrated that any further challenge before the Commission to its statutory or constitutional authority would be futile. This Court has recognized that futile challenges to agency authority before the agency are not a prerequisite to judicial review. Koepke v. Fontecchio, 177 F 2d 125 (9th Cir. 1949), and the Supreme Court has permitted persons to challenge the validity of agency regulations even though they did not participate in the agency proceeding leading to the adoption of the regulations and presumably the agency had no opportunity to pass on the specific challenge made. Frozen Food Express v. United States et al. 351 U.S. 40 (1956). The cases cited by the Respondents are not to the contrary. None involved situations where the statutory or constitutional authority of the

agency was in question. Indeed, one of those cases, United States v. Tucker Truck Lines, 344 U.S. 33 (1952), supports the Petitioners. That case involved a challenge to the authority of the Interstate Commerce Commission to enter the order in question because the hearing examiner had not been appointed pursuant to Section 11 of the Administrative Procedure Act. In rejecting the challenge, the Court noted that the claimed defect was not one which deprived the Interstate Commerce Commission of power or jurisdiction. At least by implication, however, the Court indicated that objections going to an agency's power or jurisdiction, such as those to which the Respondents are here referring, need not first be raised before the agency.

B. Petitioners Are Not Precluded from Asserting That A Hearing Was Required On Their Petitions.

With respect to Respondents' argument that the original Petitioners papers make no reference to the need for a hearing, such a request was not necessary. In Southwestern Cable Co. et al. v. United States et al., supra, this Court held as a minimum matter that the Commission could not issue an Order that was prohibitory in nature without at least complying with the procedural safeguards of Section 312 of the Communications Act for the issuance of Cease and Desist Orders. Section 312 (c) requires that the Commission provide an opportunity for a hearing before issuing a Cease and Desist Order. In view of this decision and the fact that the Commission's Order prohibits the continuation of the long established manner of operation

of the Kalispell and Polson CATV systems, a formal request for a hearing was not necessary.

Even if the procedural safeguards of Section 312 were not applicable a formal request for a hearing was not necessary. In discussing the waiver procedure set forth in Section 74.1109 of the Rules, the Commission said (Second Report and Order, 2 FCC 2d at p. 764):

"... we have undertaken in §74.1109 of the attached rules to devise flexible and fair procedures which will generally permit expeditious processing of [waiver] requests. The procedures require a written petition with notice to interested persons and afford an opportunity for submission of comments or opposition to any request and for reply. Upon good cause shown, the Commission may shorten the times specified in the rules for the filing of opposition or reply comments. The petition and all other pleadings filed by the petitioner or interested persons must contain a detailed full showing, supported by affidavit, of any facts or considerations relied upon. In the case of complaints or disputes, the steps taken by the parties to resolve their problem must also be set forth. The Commission will, where possible, promptly dispose of the matter on the basis of such written submissions. However, additional procedures such as oral argument, evidentiary hearing, or further written submissions directed to particular aspects, may be specified by the Commission if they appear necessary or appropriate after consideration of the pleadings [footnote omitted] (emphasis supplied)."

The Commission therefore stated that hearings would be held when necessary or appropriate, and it did not state that a specific request for a hearing was required. The language quoted above is incorporated in substance into Section 74.1109 (f) of the Rules and similarly does not require that a formal

2/
request for a hearing be made. H & B believes that the facts set forth in the original Petitioners' Brief demonstrates that in the circumstance of this case, a hearing was both necessary and appropriate before the waiver requests could be denied.

For the foregoing reasons and the reasons set forth by the original Petitioners' Brief, H & B urges that this Court grant the relief requested by the original Petitioners.

Respectfully submitted,

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2/ Section 74.1109(f) provides in relevant part as follows: "The Commission after consideration of the pleadings, may determine whether the public interest would be served by the grant, in whole or in part, or denial of the request, and may issue a ruling on the complaint or issue. The Commission may specify other procedures, such as oral argument, evidentiary hearing, or further written submissions directed to particular aspects as it deems appropriate."

CERTIFICATE

I certify that, in connection with the preparation of this Brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

George H. Shapiro

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JURISDICTIONAL STATEMENT

This is a joint petition for review of the Memorandum Opinion and Order of the Federal Communications Commission (Commission), in Western Microwave, Inc., et al., 10 F.C.C. 2d 656, released November 17, 1967, (R. pp. 158-182), ordering petitioners to comply with Section 74.1103(e) of the Commission's Rules and

Regulations, 47 C.F.R. 74.1103(e). This petition for review is filed pursuant to the provisions of Section 402(a) of the Communications Act of 1934, as amended, 66 Stat. 718 (1952), 47 U.S.C. §402(a) (1962); and Sections 2 and 3 of the Judicial Review Act, 64 Stat. 1129, 1130 (1950), 28 U.S.C. 2342 and 2343.

Petitioners are commonly owned corporations located and existing under and by the laws of the State of Montana and have their offices and principal places of business at Kalispell and Polson, Montana, respectively. Venue of this proceeding rests in this Judicial Circuit under Section 3 of the Judicial Review Act, 64 Stat. 1130 (1950), 28 U.S.C. 2343, and was docketed in this Court on December 7, 1967, under Case No. 22418.

STATEMENT OF THE CASE

Petitioners, Northwest Video, Inc. and Flathead Lake Cable TV, Inc. operate five-channel community antenna television (CATV) systems^{1/} in Kalispell and Polson, Montana, respectively. Petitioner Northwest Video's Kalispell CATV system also provides service to the nearby communities or subdivisions of Columbia Falls, Evergreen, Green Acres,

^{1/} "CATV is a way of delivering good television reception to areas greatly removed from the originating station. The concept includes the building of a large antenna in an area where reception is good. The antenna picks up the signal of one or more stations and transmits it or them, either by wire or microwave, to the area of poor reception. In the poor reception area, the signal is distributed to individual television receivers by wire, each receiver paying installation and monthly service fees." Southwestern Cable Co. v. United States, 378 F.2d 118, 119 (9th Cir., 1967), cert. granted 389 U.S. 911 (1967). Today, approximately 1,817 CATV systems serve approximately 3,167,000 households in the United States.

Day's Acres, Parkdale, Sunnyside, Zimwald Track, Phillips Addition and Half Moon. These communities are located approximately 90 air miles north of Missoula, Montana, wherein television station KGVO-TV is located. The Kalispell CATV system commenced service in May, 1953, and presently provides CATV service to over 4,000 subscribers supplying them with the following television signals which are received via common carrier microwave: (R. p. 2)

KXLY-TV	(CBS)	Spokane, Washington
KREM-TV	(ABC)	Spokane, Washington
KHQ-TV	(NBC)	Spokane, Washington
CJLH-TV		Lethbridge, Alberta, Canada

In addition, the Kalispell CATV system carries the signal of KGVO-TV (ABC/CBS/NBC), Missoula, Montana, as rebroadcast by station KØ9HA, a television translator station located 21 miles from Kalispell. (R. p. 2)

Petitioner Flathead Lake Cable TV, Inc. owns and operates a small CATV system located in Polson, Montana, a community of 2,314 residents located approximately 55 air miles north of Missoula. The Polson CATV system has been operating since November, 1966, and serves approximately 240 subscribers. The Polson CATV system carries the identical signals distributed by the Kalispell CATV system with the exception that the signals of KGVO-TV are received at Polson through a small one-watt translator facility. (R. pp. 113-114)

1. Regulation of CATV Systems by the FCC

Before proceeding with the impact of CATV regulations on petitioner's CATV systems, it is appropriate to assist this Court by describing briefly the history and pertinent rules of CATV regulation by the Federal Communications Commission.

The Federal Communications Commission asserted jurisdiction over CATV systems in the Second Report and Order in Docket Nos. 14895, 15233 and 15971, et al., released March 8, 1966, 2 F.C.C. 2d 725 (1966). Concerned with the alleged effects of program duplication, the Commission adopted Section 74.1103 of the Rules which established certain procedures pursuant to which a CATV system would be required to protect the program exclusivity of television stations. Section 74.1103 generally provides that a CATV system will be required, upon request and within the limits of its channel capacity, to carry without material degradation the signals of all television stations within whose Grade B service area the CATV system is located, in order of priority of signal grade.^{2/} In addition, it provides that a CATV system will be required

^{2/} The Commission classifies television service areas into three grades of service which are city-grade, Grade A and Grade B.

"Grade A service is so specified that a quality acceptable to the median observer is expected to be available for at least 90% of the time at the best 70% of receiver locations at the outer limits of this service. In the case of Grade B service, the figures are 90% of the time and 50% of the locations." Sixth Report and Order, 1 Pike & Fischer, R.R. 91:601 at 360 (1952). Cf., Clarksburg Publishing Co. v. Federal Communications Commission, 96 U.S. App. D.C. 211, 215-216 n. 12, 225 F.2d 511, 515-516 n. 12 (1955).

Under Section 74.1103(a), television stations are assigned the following four priorities in terms of signal strength: (1) principal community (city grade); (2) Grade A; (3) Grade B; and (4) translator stations.

upon request to avoid duplication of the programming of local television stations carried on the system during the same day that such programs are broadcast by the local station. This rule thus applies to programs broadcast from stations in different time zones. A local television station is only entitled to non-duplication protection on a CATV system against lower priority or more distant duplicating signals, but not against signals of equal priority (Section 74.1103(e)). Additionally, each CATV system need not delete reception of a network program if, in doing so, it would leave available for reception by subscribers, at any time, less than the programs of two networks, or would deprive them of color reception of the program (Section 74.1103(g)).

Provision was also made in the Rules whereby a waiver of the program exclusivity requirements could be requested under Section 74.1109, 47 C.F.R. 74.1109. This Section provides that the Commission may grant a waiver in whole or in part if it determines that the "public interest" would be served thereby. It also provides that the Commission may specify other procedures such as "oral argument" or "evidentiary hearing", if it deems such procedures appropriate considering the waiver request (Section 74.1109(f)). The specific provision in controversy with respect to petitioners here is Section 74.1103(e) of the Commission's Rules which, in essence, provides that when a CATV system operates within certain contours of the television station or if a 100-watt translator is assigned to its community, it must carry the signal of that station on its CATV system and must maintain program exclusivity for that station, if so requested.

2. Impact of the CATV Regulations on Petitioners' CATV Business

By letter dated May 12, 1966, KMSO-TV, Inc., licensee of television station KGVO-TV, Missoula, Montana, and of translator station KØ9HA, located 21 miles from Kalispell, requested Northwest Video, Inc. to provide non-duplication protection to KØ9HA in accordance with Section 74.1103 of the Rules. The programs rebroadcast by KØ9HA are those programs broadcast by KGVO-TV which does not cover the Kalispell CATV system with a predicted Grade B signal. As a translator station, KØ9HA operates with 100 watts power and is thus classified as a Fourth Priority station under Section 74.1103(a)(4) of the Commission's Rules.

On June 17, 1966, petitioner Northwest Video, Inc. filed a "Petition for Waiver" of the program exclusivity requirements of Sections 21.712 and 74.1103 with respect to the signal of KØ9HA, which, as indicated, rebroadcast the signals of KGVO-TV. KMSO-TV, Inc. opposed the waiver request of petitioner Northwest Video, Inc. and petitioner replied thereto.

In a Memorandum Opinion and Order released November 17, 1967, 10 F.C.C. 2d 656 (1967), the Commission denied without hearing the Petition for Waiver of petitioner Northwest Video, Inc. and directed compliance with the Rules within 30 days thereafter or by December 17, 1967. (R. pp. 168-171, 175)

By letter dated March 30, 1967, KMSO-TV, Inc., licensee of KGVO-TV, requested non-duplication protection with respect to the programming of KGVO-TV carried on the Polson CATV system. In response

thereto, petitioner Flathead Lake Cable TV, Inc. filed with the Commission on April 17, 1967, a petition for waiver of the program exclusivity requirements of Sections 21.712 and 74.1103 with respect to the signal of KGVO-TV. This waiver request was also denied without hearing by the Commission in its Memorandum Opinion and Order, released November 17, 1967. (R. pp. 172-175)

As a result of the Orders issued by the Commission, the effect on petitioner's CATV operations in Kalispell and Polson will be direct and substantial. The Kalispell CATV system, which has been in operation for over 14 years, commenced service prior to the operation of KGVO-TV. Protection of over 75% of the programming of the three major networks as broadcast by KGVO-TV on either of the five-channel CATV systems serving Kalispell and Polson will result in deletion of a large part of the applicable Spokane stations' programming on the system during the time when KGVO-TV programming is being duplicated. (R. pp. 98, 103-104; Taylor Affidavit to Motion for Stay, pp. 7-8) Subscribers who are accustomed to viewing Spokane network programming on Pacific time will now be forced to view on Mountain time those shows deleted by KGVO-TV programming which is fed from Salt Lake City. In addition to wholesale deletion of Spokane programming, subscriber viewing times will be drastically changed.

Because of the unusual and complex method by which KGVO-TV obtains a major part of its programming, subscribers will be forced to view an inferior signal from KØ9HA in Kalispell and from KGVO-TV in Polson in lieu of the high-quality signals received via microwave from Spokane. (R. pp. 2-7, 61-76) Petitioners' investments in Kali-

spell and Polson will be substantially impaired to the extent that subscribers may actually lose the television viewing which they have had for some time.

Petitioner Northwest Video has expended a substantial sum of money to improve picture quality from the Spokane stations and has introduced sophisticated technical equipment to improve reception. Elimination of the programming of Spokane stations when non-duplication protection would be required to be provided for the programming of KGVO-TV would delete a major feature of petitioners' services in Kalispell and in Polson. Immediate and substantial subscriber cancellation would result which would seriously threaten petitioners' investments in each system. Petitioners' subscriber loss in revenue in each instance would be heavy enough to cause severe economic loss to the Kalispell CATV system and, since Polson is an extremely small system operating at a loss, could destroy the operation. (Taylor Affidavit to Motion for Stay, pp. 9-10)

In addition, compliance with the non-duplication requirements will necessitate the installation of expensive automatic "switching" equipment to accomplish program deletion. (Taylor Affidavit to Motion for Stay, pp. 9-11) The hiring of additional skilled operating personnel will be required, which will permanently increase the system's cost of operation, all of this apart from the deprivation of the right of petitioners' subscribers to select the television stations which they desire to view.

It is clear that petitioners' present and future business operations will be severely restricted and disrupted if the Commission's Orders are allowed to stand. Failure to conform to the Commission's Regulations would entail serious legal consequences to petitioners under the Enforcement and Sanction provisions of the Communications Act.^{3/} Being thus adversely affected and aggrieved thereby, petitioners timely filed in this Court its petition for review alleging inter alia (a) that the Commission's action asserting jurisdiction over the CATV industry constituted an unlawful effort to regulate a non-jurisdictional activity and extended the agency's jurisdiction beyond its statutory authority; (b) that certain of the Commission's regulations constitute unconstitutional invasions and restrictions on the right of CATV subscribers to watch and listen to television programs as protected by the First Amendment to the Constitution; (c) that the effect of the CATV regulations constituted an unlawful taking of property without compensation in violation of the Due Process clause of the Fifth Amendment to the United States Constitution; and (d) that the Commission's action without first conducting a full evidentiary hearing constituted a denial of due process in violation of the Administrative Procedure Act and the Constitution of the United States. The petition prayed that the Commission's Order be set aside as unlawful insofar as it denied the petitions for waiver of Northwest

^{3/} See, e.g., 47 U.S.C. §§501, 502, which provide for imprisonment and/or monetary fine for violations of the Communications Act and "any rule, regulations, restriction or condition made or imposed by the Commission under authority" thereof.

Video, Inc. and Flathead Lake Cable TV Co., Inc. and that this Court afford such interim or pendente lite relief as this Court deemed necessary. On December 14, 1967, petitioners filed a Motion for Stay in this Court. Oral argument was heard thereon and on January 10, 1968, this Court granted a stay of the Memorandum Opinion and Order of the Commission in Western Microwave, Inc., et al., pending disposition of the petitions for review in this case and in Case No. 22393. The entire record of this petition for review is contained in the pleadings and orders of the Commission. Since no hearing was afforded petitioners, no evidence was taken.

ARGUMENT

Petitioners' specification of errors and legal argument are identical to those of petitioner Great Falls Community TV Cable Co., Inc. in Case No. 22393 in this Court. In that case, Great Falls Community TV Cable Co., Inc. filed a petition for review of the same order of the Commission of which petitioners here seek review. With the exception of certain factual circumstances, the issues raised in this petition and in Case No. 22393 are identical to those issues raised by petitioners. Petitioners herein therefore agree with the views and arguments of the petitioner Great Falls Community TV Cable Co., Inc. in Case No. 22393 with respect to the questions raised on the merits of this proceeding and adopt those views and arguments as their own. With respect to petitioners' unique factual situation, petitioners submit for this Court's consideration the following additional argument.

I. The Commission's Failure to Hold
a Hearing Violates the Basic
Tenets of Due Process

It is now clear from the operation of the CATV Rules that the Commission's regulatory control over CATV is more stringent and restrictive than its exercise of its licensing authority over other communication media. The safeguards of a full evidentiary hearing which are afforded to Commission licensees when their operations are modified are denied to a CATV system when the Commission proscriptively modifies an existing CATV business. In this procedural environment, the strictures of unreasonable and arbitrary administrative action unnecessarily choke or threaten the development of this method of communication contrary to the public interest. This procedural effect will never be more clearly apparent than in the instant case in view of the unusual and complex factual situations which characterize petitioners' CATV operations.

Although the details of the method by which petitioners receive the programs of the Spokane and Missoula stations and the technical method by which KGVO-TV in Missoula obtains its programs are unusually complex, some understanding of them is important to place in proper perspective what petitioners have been directed to do by Commission order without any hearing.

The Spokane television stations are located approximately 150 miles from Kalispell. They are received by Northwest Video, Inc. by means of an antenna structure located on Big Mountain, approximately

20 miles north of Kalispell, where they are delivered by cable to a microwave common carrier, Microwave Service Company. This carrier relays the signals via microwave to the CATV systems at Kalispell and Polson. These same signals are also relayed to Missoula, Montana, approximately 110 miles farther south. At Missoula, these signals are received by the local CATV system which utilizes them and in turn delivers them to KGVO-TV. KGVO-TV then broadcasts these same programs. The signal of KGVO-TV does not reach Kalispell, so KGVO-TV has installed an auxiliary reception device called a translator on the same Big Mountain on which the Spokane signals are first received. This translator then rebroadcasts the KGVO-TV signal to Kalispell, 21 miles away. The Kalispell CATV system is thus being asked to black out the same television programs which were initially received at Big Mountain but only after they have been carried over a circuitous 254-mile transmission path. (R. pp. 2-7, 61-76; Taylor Affidavit to Motion for Stay, pp. 2-6) This anomaly only exists because the Commission in its Second Report and Order, 2 F.C.C. 2d 725 (1966), established a translator as a fourth priority station for purposes of its non-duplication requirements.

The same complex and circuitous transmission and retransmission of programming is involved with respect to the Polson CATV system with the exception that Polson is located somewhat closer to Missoula and within the predicted Grade B contour of KGVO-TV. However, the KGVO-TV programming is also delivered to the community of Polson through a translator device as at Kalispell. (R. pp. 114-117)

Petitioners in their petitions for waiver to the Commission requested a Commission field investigation concerning their charges of technical inadequacy of signal and in addition, requested, apart from waiver, any other appropriate relief. (R. p. 60) Detailed engineering showings prepared by professional engineers were presented describing the signal deficiencies and the causes therefor with respect to reception of KGVO-TV in the Kalispell and Polson areas. (R. pp. 61-77) No substantial evidence to the contrary was offered by pleading or otherwise by any party and petitioners' extensive exhibits stand essentially un rebutted.

With respect to the exhibits of petitioner Flathead Lake Cable TV, Inc. concerning the Polson CATV system, the Commission dismissed petitioner's showing in one sentence: "Data submitted by petitioner, or incorporated in its petition, are insufficient to establish evidence of absence of reception in Polson." 10 F.C.C. 2d at 667. With respect to petitioner Northwest Video, Inc.'s showing concerning Kalispell, the Commission itself recognized that "there could remain some question concerning the signal of KØ9HA" but again summarily rejected petitioners' arguments with the short statement that "we do not believe Northwest Video has sustained its initial burden of alleging sufficient facts to warrant waiver or a hearing". Id. at 666. Due process demands more.

This cavalier approach to petitioners' showing was discussed and discarded in a recent decision of the United States Court of Appeals for the First Circuit which, in reversing a Commission order

denying an identical waiver request in substantially similar circumstances, describes the Commission's obligations in cases of this type. Presque Isle TV Co., Inc. v. United States, (C.A. 1. No. 6896, Slip Opinion, December 18, 1967. See Appendix to Joint Reply to Oppositions to Motion for Stay).

In Presque Isle TV, like here, a microwave-served CATV system requested a waiver of the non-duplication rules; like here, extensive engineering showings were made by the petitioner; like here, such showings were substantially un rebutted, by affidavit or otherwise before the Commission; and, like here, the Commission summarily rejected petitioner's showings on the ground that they were "inadequately supported . . ." (Slip Opinion, p. 8). It is fair to state that the First Circuit strongly criticized these Commission procedures. Stating that it could not understand the Commission's summary rejection of the petitioner's extensive and uncontradicted affidavit material, the court pointed out that they were "unexceptionable and uncontradicted" and that there "was no justifiable basis for the Commission sweeping them aside with a part of one sentence" (Slip Opinion, p. 8, Emphasis Added). Commenting on a number of possible courses of action which the Commission in Presque Isle might have taken (and which, like the instant case, it did not take) the court concluded as follows:

"The Commission, however, was unwilling to make these decisions, and its shutting its eyes to conspicuous facts is some measure of its unwillingness. Within broad limits the Commission may make policy determinations, but if review is to have any meaning the Commission cannot, in effect, back into them without openly making them, by ignoring the facts presented."
(Slip Opinion, p. 10.)

Petitioners submit the facts in the instant case are even stronger than those in Presque Isle. The decision there by the First Circuit is compelling and should be given great weight by this Court in its evaluation of the factual picture in this case. The Commission's cursory dismissal of petitioners' uncontroverted professional engineering exhibits is, indeed, an abuse of due process and evidences the Commission's prejudged presumption of CATV's alleged economic damage to television broadcast stations.

A. The Commission's Action is a Denial
of Due Process in Violation of the
Fifth Amendment

The Commission's failure to afford petitioners a full evidentiary hearing is a violation of the constitutional due process requirement of the Fifth Amendment. Petitioners submit, and believe respondents will agree, that the Commission's proscriptive order will substantially modify the conduct of their respective CATV businesses by petitioners.^{4/} To this extent petitioners submit that the language of the United States Court of Appeals for the District of Columbia Circuit in National Broadcasting Co. v. F.C.C., 362 F.2d 946 (D.C. Cir. 1966) aptly describes why a hearing should have been held in the instant case:

^{4/} Petitioners will be required to black out 75% of the programs of the three national networks as rebroadcast by KGVO-TV (See Taylor Affidavit to Motion for Stay, pp. 7-8) - 85 hours of television programming as presently carried on each of the two CATV systems would have to be deleted.

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"We have not been unmindful of the cardinal importance of the right to be heard where one's interests are acutely affected by the actions of an administrative agency. It is fundamentally abhorrent to our system of jurisprudence to deny a hearing to a litigant where justice and law require that a hearing be held." 362 F.2d at 953.

The Supreme Court of the United States also defined this

fundamental tenet:

"[W]hen governmental agencies adjudicate or make binding determinations which directly affect the legal rights of individuals, it is imperative that those agencies use the procedures which have traditionally been associated with the judicial process. Hannah v. Larche, 363 U.S. 420 at 442 (1960).

This Court had occasion to examine due process requirements in

Superior Oil Company v. F.P.C., 322 F.2d 601 (9th Cir. 1963), cert.

denied, 377 U.S. 922 (1964) which concerned the denial of a hearing in

an administrative proceeding. In noting that the rule challenged in

that case was not adjudicatory in nature and did not affect any contrac-

tual right in existence at the time the rule became effective, this

Court agreed that the "problem would be different if the effect of the

rules was to proscribe rates already in effect". 322 F.2d at 615.

In the instant case, the Commission sought to modify the business of

the Kalispell CATV system which had been operating for over 14 years.

This was a flagrant denial of due process. CAB v. Delta Airlines,

367 U.S. 316 (1960); Seatrail Lines v. United States, 64 F. Supp. 156

(1946), affirmed 329 U.S. 424 (1947).

The invalid character of the Commission's proscriptive order is readily apparent against the background of the court's decision in Standard Airlines, Inc. v. Civil Aeronautics Board, 177 F.2d 18 (D.C. Cir. 1949). The court's rejection of an attempt by the agency to establish a special class of irregular air carrier through issuance of "letters of registration" which could be revoked without hearing was based on the fact that a revocation of this permit would destroy business and investment property, not only a type of license. In the instant case, petitioners, who are not licensees, also stand shorn of due process by an agency which substantially changes and threatens the existence of petitioners' business.

The destruction of a petitioner's assets was recently of concern to this Court in Southwestern Cable Co. v. United States, 378 F.2d 118 (9th Cir. 1967), cert. granted, 389 U.S. 911 (1967). Judge Ely's concurring opinion is appropriately relevant to this case:

"It is not unreasonable to assume that the petitioners considered this history [the Commission's disavowal of CATV jurisdiction] in making their determination to embark on their ventures. They then undertook their lawful pursuits investing substantial sums of money, and, incidentally, proceeding under the auspices of the responsible San Diego officials who issued the required municipal permits. Not until petitioners had incurred the expense of installing necessary and fixed facilities and had acquired subscribing customers did the Commission presume to issue the order which, if enforceable, would adversely affect if not destroy the Petitioner's investments.

"In the light of the only conferred powers under which its authority exists . . . and in the light of all the circumstances . . . I believe that the Commission trespassed upon constitutional safeguards against the confiscation of property." Southwestern Cable Co., supra. Note 63 at 10 (Concurring opinion). (Emphasis Added.)

It is also not unreasonable to state that the Commission's action is sadly lacking in the rudiments of fair play in its undisguised effort to protect the television industry. Petitioners' existing business and investment of 14 years in Kalispell, established a decade before the Commission asserted jurisdiction over CATV, is seriously threatened economically. The small Polson CATV system would suffer even more immediate economic disaster.

Guidelines for establishing when due process was violated in the face of severe economic injury were clarified by the court in Gonzales v. Freeman, 334 F.2d 570 (D.C. Cir. 1964). In reversing an invalid action by the Secretary of Agriculture the court stressed considerations of basic fairness:

"The governmental interests on the one hand and the individual interests on the other must be balanced and the procedures established must be considered in light of various questions which courts have postulated from time to time: How was the individual likely to be hurt? What governmental interest was to be protected? How would the governmental interest be affected, if at all, by extending procedural safeguards to cover the challenged action?" Id. at 579.

On the basis of the uncontradicted facts in this case, the answers to the questions postulated by the court above are so clear that it seems incredible that no hearing was held in this case. No

governmental-television interest would be destroyed nor seriously threatened by holding an evidentiary hearing. Only petitioners' CATV businesses were likely to be destroyed.

B. The Communications Act and the
Administrative Procedure Act
Require a Hearing

It is plain that when a modification of a licensee's existing operation is proposed, the Federal Communications Commission offers its licensees due process safeguards which were denied petitioner as a non-licensed but regulated entity. An examination of certain portions of the Communications Act of 1934 reveals this inconsistent and basically unfair procedure.

Section 316, 47 U.S.C. 316, requires a full evidentiary hearing with the burden of proof placed upon the Commission before a license or a construction permit can be modified, but that is before the method of operation of a licensee can be changed. Although a CATV system is not a licensee, as petitioners are not, petitioners' method of operation is substantially changed here without hearing. It is contrary to due process to impose on CATV systems the type of authority imposed on licensees and at the same time to deny to the same systems the procedural protection of the Act because they are not licensees.

The due process basis of Section 312 of the Act, 47 U.S.C. 312, appears clearly pertinent also. Before revoking a license or permit, the Commission must serve a show cause order and again allow

a party a full evidentiary hearing with the burden of proof placed on the Commission.

When the Commission issued its proscriptive order requiring petitioners to provide program exclusivity within 30 days, its action was identical in nature to a cease and desist order under Section 312 of the Act. In Southwestern Cable Co. v. United States, supra, this Court recently reversed a similar attempt by the Commission to operate in this summary manner under the CATV Rules. In Southwestern Cable Co., the Commission imposed a freeze on the expansion of a San Diego CATV system. Petitioner in that case challenged inter alia the Commission's authority to issue such a "freeze" order.

The Commission argued that its action did not constitute a cease and desist order under Section 312, but was a grant of temporary relief under Section 74.1109(f). The Commission's authority for this grant of temporary relief was based on its rule making authority under Sections 4(i) and 303(r), 47 U.S.C. 4(i) and 303(r), of the Communications Act. However, this Court held that the order was indeed prohibitory in nature and amounted to a cease and desist order. As such, the safeguards of Section 312 were applicable. The court also concluded that since Sections 4(i) and 303(r) were limited to the scope of the Commission's licensing function, that as against a non-licensee, the Commission's only authority to issue proscriptive orders was limited to Section 312 of the Act with its attendant safeguards.

In the instant case, the Commission's order is patently proscriptive to the extent that it orders petitioner Northwest Video, Inc.

to cease and desist, without hearing, a substantial part of its existing business which has been operating for over 14 years! The Polson CATV system which has been operating for over one year faces economic ruin. At a minimum, the safeguards of Section 312 would afford petitioner protection against this arbitrary and unreasonable exercise of misapplied authority.

In this connection, petitioners also direct the court's attention to Section 309(e), 47 U.S.C. 309(e), of the Act which requires a full evidentiary hearing where a substantial and material issue of fact exists with respect to an application for license. Likewise, Section 303(m)(2), 47 U.S.C. 303(m)(2), provides for a hearing where the suspension of an existing license is proposed. Even a cursory examination of the nature of these sections must lead to the conclusion that the Commission was required to hold a hearing as a matter of law when, after asserting jurisdiction over the conduct of petitioners' business, it proceeded to modify substantially petitioners' method of business operation. Fundamental due process requires no other result.

The CATV Rules also conflict with the requirements of the Administrative Procedure Act, 5 U.S.C. 551, et seq. When the Commission denied petitioners' petitions for waiver, it denied a "license" within the meaning of 5 U.S.C. 151(8), it issued an "order" within the meaning of 5 U.S.C. 551(6), and it disposed of an "adjudication" within the meaning of 5 U.S.C. 551(7). Petitioners submit that the question of whether or not the KGVO-TV signal at Kalispell and at Polson is inferior is and remains an adjudicatory fact which must be adjudicated pursuant to the requirements of 5 U.S.C. 554 and 556.

See 1 Davis, Administrative Law, §7.02, pp. 412-415 (1958).

In summary, apart from the legal violation implicit in the Commission's action, the particular circumstances of the Kalispell and Polson CATV systems required that a hearing be held. A summary examination of the facts warrants this conclusion. The complex method of receipt and retransmission of the programs broadcast by KGVO-TV is in the record and has not been denied by the station nor by the Commission. Through the affidavits of professional engineers, the serious deficiencies of the quality of the translator signals at Kalispell and Polson caused by this method of retransmission were examined. Without significant rebuttal, the substantial portions of time during which the translator stations were off the air were enumerated. In response the Commission articulated its belief that with respect to Kalispell, Northwest Video had not sustained "its initial burden of alleging sufficient facts to warrant waiver or hearing". And, that with respect to Polson the "Data submitted by Petitioner or incorporated in its petition are insufficient to establish evidence of absence of reception in Polson". Thus, the Commission implicitly made a finding that the translators located at Kalispell and at Polson adequately served the community. But all of the evidence in these cases was to the contrary since petitioners' affidavits were uncontradicted.

Moreover, this implicit finding of the Commission with respect to Kalispell translator service is contrary to the Commission's own translator rules, since KØ9HA is located 16 miles beyond the

preferred five-mile translator-to-community distance specified in Section 74.737(b), 47 C.F.R. 74.737(b), of the Commission's Rules. Since no provision is made in the Commission's Rules for prediction or presumption of translator service, Midwest Television, Inc., 6 F.C.C. 2d 560 (1967), and since the KØ9HA translator location far exceeds the Commission's preferred limitation, petitioners had no presumption of service to overcome.

Illustrative of the Commission's summary dismissal of petitioners' engineering data is the following excerpt from the Memorandum Opinion and Order concerning the Kalispell CATV system:

"Northwest Video has supplied three engineering statements which, in the main, purport to show that the translator signal is comparatively inferior to the same signal obtained directly from the Spokane stations. KMSO-TV, Inc. has criticized these statements and pointed to serious discrepancies in them. In these circumstances, we do not believe that Northwest Video has sustained its initial burden of alleging sufficient facts to warrant waiver or hearing." (10 F.C.C. 2d at 666) (Emphasis Added.)

What circumstances? A review of the pleadings filed by KMSO-TV, Inc. shows that no "serious discrepancies" were revealed by KMSO-TV. The Commission's finding of the discovery of serious discrepancies by KMSO-TV is without foundation in fact. Since petitioners' engineering data stands uncontradicted, the Commission's language can only be viewed as an attempt to whitewash a finding made in the face of material questions of fact.

At the very least, petitioners' uncontradicted engineering statements raised material questions of fact which required a hearing -

not a summary rejection in a few words. In view of the foregoing, petitioners respectfully submit that this Court should remand this case to the Commission for hearing to resolve material questions of fact which remain totally unanswered.

Conclusion

Petitioners pray that the court set aside and declare unlawful the action of the Federal Communications Commission as set forth in its Memorandum Opinion and Order of November 17, 1967; that it determine as invalid the CATV Rules promulgated by the Federal Communications Commission; that it declare the CATV non-duplication rules, 47 C.F.R. 21.712 and 74.1103, invalid as a prior restraint in the receipt and distribution of information; or in the alternative, that this Court determine that petitioners are entitled to a full evidentiary hearing on their respective petitions for waiver; and that it therefore remand the matter to the Commission for an evidentiary hearing.

Respectfully submitted,

/s/ JOHN D. MATTHEWS

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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ John D. Matthews

John D. Matthews

CERTIFICATE

I, Richard F. Swift, do hereby certify that, pursuant to Rule 18 of the United States Court of Appeals for the Ninth Circuit, copies of the foregoing "Brief for Petitioners" were mailed, postage prepaid by first-class mail on March 14, 1968, to the following:

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I further certify that in connection with the preparation of said brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with these rules.

/s/ Richard F. Swift

Richard F. Swift

Subscribed and sworn to before me
this 19th day of March, 1968.

/s/ Mildred K. Jones

Notary Public

My Commission Expires: September 14, 1971

[SEAL]

